

OFFICIAL



CDPP

Australia's Federal Prosecution Service



Submission by the Office of the Director of Public Prosecutions (Cth)

Senate Legal and Constitutional Affairs References Committee
Inquiry into the MRH90 Taipan Helicopter incident

March 2026

OFFICIAL

OFFICIAL

March 2026

Submission by the Office of the Director of Public Prosecutions (Cth)

Introduction

1. The Office of the Director of Public Prosecutions (Cth) (**CDPP**) acknowledges the invitation from the Legal and Constitutional Affairs Reference Committee – Inquiry into the MRH90 Taipan Helicopter Incident (**the Inquiry**) to make a submission addressing some or all of the terms of reference of the Inquiry.
2. This submission provides information to address the terms of reference to the extent that it does not create a risk of prejudice to any further investigation and potential prosecution.
3. For the reasons set out below, I and my Office have significant concerns that disclosing further information, particularly in relation to paragraphs (c) and (e) of the terms of reference, would be detrimental to the prospects of further investigation and potential prosecution in relation to the incident and that this outcome is not in the public interest and not conducive to the administration of justice.

Role of the CDPP

4. The CDPP was established under the *Director of Public Prosecutions Act 1983* (Cth) and sits within the Attorney-General's portfolio. The CDPP is headed by the Director of Public Prosecutions (Cth) (**the Director**), who is appointed for a statutory term of up to seven years.
5. The CDPP's principal role is to prosecute offences against Commonwealth law. The CDPP is not an investigatory or regulatory agency and has no investigation powers or functions.
6. The CDPP's purpose is to contribute to a fair, safe and just society by delivering effective, independent prosecution services in accordance with the *Prosecution Policy of the Commonwealth*.
7. Prosecution decisions are made in accordance with the guidelines set out in the *Prosecution Policy of the Commonwealth*. We make those decisions independent of government and independent of our partner agencies which conduct investigations and refer us briefs of evidence. The CDPP is an independent legal practice.
8. The threshold issue in any criminal case is whether charges should be laid, or continued, against the alleged offender. The *Prosecution Policy* sets out a three-stage test that must be satisfied:
 - 8.1. first, the prosecution must be satisfied that there is a prima facie case;
 - 8.2. only if there is a prima facie case, will the prosecution go on to consider the evidence. There must also be sufficient admissible evidence to prosecute the case meaning that there also be reasonable prospects of conviction; and
 - 8.3. if there is sufficient evidence, it must also be clear from the facts of the case and all the surrounding circumstances, that prosecution would be in the public interest.

OFFICIAL

OFFICIAL

March 2026

Submission by the Office of the Director of Public Prosecutions (Cth)

Terms of Reference of the Inquiry

9. On 4 February 2026, the Senate referred an inquiry into the MRH90 Taipan Helicopter incident to the Legal and Constitutional Affairs References Committee for inquiry and report. The terms of reference of the inquiry are the fatal July 2023 MRH-90 Taipan Helicopter incident in the Whitsundays, with specific reference to:
- (a) airworthiness assessments of the MRH-90 platform and associated equipment;
 - (b) Army Aviation compliance with the Defence Aviation Safety Regulations;
 - (c) findings of the Comcare investigation into the incident;
 - (d) any other investigations into the incident;
 - (e) the appropriateness of the decision not to prosecute any matters arising from the incident; and
 - (f) any other related matters.
10. This submission addresses the terms of reference (c) and (e).

The limitation period in the WHS Act

11. Section 232 of the *Work Health and Safety Act 2011* (Cth) (**WHS Act**) imposes limitation periods for prosecutions against the Act, which depend on the nature of the investigation that is conducted:
- 11.1. pursuant to s 232(1)(a), a prosecution must be commenced within 2 years of Comcare becoming aware of the incident, and
 - 11.2. pursuant to s 232(1)(b), a prosecution must be commenced within 1 year after an *official inquiry* ends, if it appears “from the report or the proceedings at the inquiry ... than an offence had been committed”.
12. An “official inquiry” is relevantly defined by s 232(3) as including “a commission of inquiry conducted under regulations made under the *Defence Act 1903*”.
13. In *S Kidman & Co v Lowndes CM* [2016] NTCA 5, the Court of Appeal in the Northern Territory held that the time period in s 232(1)(b) in the *Work Health and Safety (National Uniform Legislation) Act 2011* (NT), which is in the same terms as s 232(1)(b) in the WHS Act, is different from the two-year limitation provided by s 232(1)(a). In that case, the charge was laid outside the two-year limitation period, but within 1 year of a coronial report being finalised.

The Comcare Investigation and Assessment for Prosecution

14. On 28 July 2023, a Taipan helicopter that was taking part in a large military training exercise crashed into the sea killing all four army personnel onboard.

OFFICIAL

OFFICIAL

March 2026

Submission by the Office of the Director of Public Prosecutions (Cth)

15. Comcare, the Commonwealth work health and safety regulator, immediately commenced an investigation into whether the accident had involved any breach by the Department of Defence (DoD) of its work, health and safety obligations under the WHS Act.
16. Pursuant to s 232(1)(a) of the WHS Act, the limitation period in relation to Comcare's investigation expired on 27 July 2025.
17. On 27 March 2025, Comcare referred a brief of evidence to the CDPP. That brief related to the DoD's management of fatigue in relation to the incident. On 25 June 2025, Comcare referred a further brief concerning the operation of the pilot's helmet mounted sight display system.
18. Members of staff of the CDPP, with the assistance of experienced senior and junior counsel from the private Bar, assessed the briefs of evidence to determine, in accordance with the *Prosecution Policy of the Commonwealth*, if the evidence contained in those briefs established a prima facie case and reasonable prospects of conviction for offences against the WHS Act.
19. On 21 and 22 July 2025 (respectively), Comcare was informed that on the basis of the evidence contained in the briefs that had been referred, there were no reasonable prospects of conviction for any offence against the WHS Act in relation to either the management of fatigue or the helmet mounted sight display system.
20. That decision was communicated to the families of the servicemen killed in the incident. The families asked that the decision be reviewed pursuant to the CDPP's policy in such matters.
21. As the Director, I personally undertook that review and determined that based on the admissible evidence contained in the briefs referred in March and June 2025, there are no reasonable prospects of conviction in relation to the allegations referred to the CDPP. The family members of the deceased were informed of the outcome of the review on 6 February 2026.

The Inspector-General of the Australian Defence Force MRH-90 Inquiry (McMurdo Inquiry)

22. In October 2023, acting under [s 10\(2\) of the Inspector-General of the Australian Defence Force Regulation 2016 \(Cth\)](#), the Inspector-General of the Australian Defence Force asked former Justice the Honourable Margaret McMurdo AC to undertake an inquiry to rigorously examine the circumstances and causes of the deaths to determine whether actions or inactions by ADF personnel or others; compliance or non-compliance with policies and procedures; or other matters were contributing factors (the **McMurdo Inquiry**).
23. The McMurdo Inquiry held 57¹ days of hearings in public, and examined numerous witnesses. The Inquiry's hearings and evidence gathering phases have concluded. The CDPP expects that the inquiry's report will be finalised soon.

¹ [IGADF MRH-90 Inquiry | Inspector-General of the Australian Defence Force.](#)

OFFICIAL

March 2026

Submission by the Office of the Director of Public Prosecutions (Cth)

24. The McMurdo Inquiry appears to fall within the definition of an *official inquiry* in s 232(3) of the WHS Act. As a result, if it appears from the report or the proceedings of the Inquiry that an offence has been committed, the limitation period has not yet concluded.
25. The decision to conduct a further investigation and to refer a further brief of evidence as a result of the findings of the McMurdo Inquiry is a decision to be made by Comcare. A review of the report of the McMurdo Inquiry will determine whether there is further evidence that may support referral of another brief of evidence.
26. If Comcare refers a further brief of evidence to the CDPP following the McMurdo Inquiry, we will assess that brief in accordance with the *Prosecution Policy of the Commonwealth*. This may result in a decision to prosecute the DoD for offences against the WHS Act in relation to the incident.

Public Interest Immunity

27. The terms of reference of the Committee's Inquiry requires it to consider the findings of the Comcare investigation into the incident and the appropriateness of the decision not to prosecute any matters arising from the incident. This will necessarily involve examining the legal considerations behind the decisions in July 2025 not to proceed with a prosecution, and the review of that decision which I conducted, as the Director. Disclosing those considerations could adversely impact the ability to undertake any future prosecution.
28. In this context, there are two established grounds² for the exercise of public interest immunity to preclude disclosure of confidential communication between the CDPP and Comcare:
 - 28.1. that any disclosure may prejudice the investigation of a possible breach of the law or the enforcement of the law in a particular instance, or
 - 28.2. that any disclosure may prejudice the fair trial of a person or the impartial adjudication of a particular case.
29. The disclosure of the evidence and prosecutorial decision-making process in this matter are likely to adversely impact the CDPP's ability to undertake any future prosecution arising from a consideration of the McMurdo Inquiry report, including providing a basis for collateral challenges to the prosecution process. Further, publicly disclosing the evidence prior to any charges being laid may prejudice Comcare's ability to obtain further evidence. These outcomes would be contrary to the administration of justice and public interest.
30. In this regard, in response to the Senate's order for the production of documents made on 27 August 2025 (Senate Order ref 115), the Hon Amanda Rishworth MP, Minister for Employment and Workplace Relations, made a public interest immunity claim over the brief of evidence Comcare referred to the CDPP.³

² [Government Guidance for Official Witnesses before Parliamentary Committees and Related Matters](#) at paragraph 4.6.1(d) & (g).

³ https://www.aph.gov.au/Parliamentary_Business/Tabled_Documents/12356.

OFFICIAL

March 2026

Submission by the Office of the Director of Public Prosecutions (Cth)

31. If my Office was to address terms of reference (c) and (e), any further than we have in this submission, it would be inconsistent with that claim.

Legal Advice

32. In addition, the advice to Comcare regarding the assessment of the briefs of evidence and its reasons for the decision not to commence a prosecution constitutes confidential legal advice.
33. It is integral that privileged legal advice remains confidential to prevent harm to the administration of justice that would result from disclosure. Both the High Court of Australia and Federal Court of Australia have confirmed that legal professional privilege promotes the public interest by enhancing the administration of justice.
34. It is not in the public interest to disclose the legal advice that constitutes the assessment of the briefs of evidence.

Conclusion

35. In circumstances where the McMurdo inquiry is ongoing and there is potential for a prosecution still to be brought, it is not in the public interest to provide information on the Comcare investigation and the appropriateness of the decision not to prosecute any matters arising from the MRH90 incident.



Raelene Sharp KC
Director of Public Prosecutions (Cth)